

## Chapter III

# LABOR STANDARDS

### **Labor Standard Requirements**

Development Projects undertaken by State Recipients or CHDOs may be subject to various federal (24 CFR Part 354, see Appendix III-J), and state wage and hour statutes and regulations. Since compliance with federal and state labor standards can have significant cost and time impacts, HOME contractors, (State Recipients and CHDOs) should determine whether they are required early on in the project planning phase. A project's size (number of units), type and number of funding sources, and potential contractual relationships can all contribute determining whether wage and hour standards are invoked.

HOME contractors can receive guidance and technical assistance from their HOME representative. More subtle or complex questions can be referred to the HOME Program Labor Standards Specialist, who will obtain guidance from HUD as needed.

HOME contractors who have concluded early in the project planning phase that federal or State labor standards will apply should be sure to adequately budget anticipated higher "hard" construction costs (normally in the range of 15-25% higher depending on type of work, architectural design, geographical area, etc.). A project with an inadequate construction budget can be difficult to complete successfully.

Those HOME contractors who desire to design a project (or projects) for which federal labor wage standards will not apply, need to ensure that they comply with all provisions that exempt them from these standards. Early consultation with their HOME representative will help prevent unwanted and costly surprises closer to actual construction time.

The following four federal labor standards laws apply to the HOME Program:

1. The Davis-Bacon and Related Acts (referred to as DBRA) is published in Chapter 3, section 276(a) 7 et seq of U.S.C. Title 40 and ensures that mechanics and laborers employed in construction work under federally-assisted contracts are paid wages and fringe benefits equal to those that prevail in the locality where the work is performed. According to the Department of Labor regulations, the term mechanics and laborers "includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial..." The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Laborers and mechanics include apprentices, trainees, and helpers. Categories of workers considered not to be labors or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project are architects and engineers, timekeepers, and inspectors. Non-exempt working foremen who

devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 CFR 541, are laborers and mechanics for the time so spent. The working foreman is due the rate listed in the contract wage determination for the classification of work performed. Owners of a subcontractor firm who are themselves performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the classification of work performed. If the subcontract price covers the applicable prevailing wage rate for the number of hours worked as a laborer or mechanic on the job, the Department of Labor considers the owner/subcontractor to have been paid in compliance.

Prevailing wages are computed by the Department of Labor (DOL) and are issued in the form of Federal wage decisions for each classification of work. The law applies to federal construction projects over \$2,000. In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately 60 statutes which assist construction projects through grants, loans, loan guarantees, and insurance. These "related Acts" involve construction in such areas as transportation, housing, air and water pollution reduction, and health.

2. The Copeland "Anti-Kickback" Act (referred to as the Anti-Kickback Act) is published in Chapter 3, section 276(c) of U.S.C. Title 40, and requires that workers be paid unconditionally at least once a week without any deductions or rebates, except "permissible" deductions. Permissible deductions include taxes, deductions the worker authorizes in writing, and deductions required by court processes. This Act also requires construction contractors to submit weekly payroll records along with Statements of Compliance to the contracting agency. The Anti-Kickback Act applies to all contracts covered by DBRA and makes it a criminal offense to induce anyone employed on a federally assisted project to relinquish any compensation to which he/she is entitled.
3. The Contract Work Hours and Safety Standards Act, as amended (referred to as CWHSSA), is published in Chapter 5, Subchapter II, section 327 et seq. of U.S.C. Title 40, and requires that mechanics and laborers employed on federally assisted construction jobs receive "overtime" compensation at a rate of one and one-half times their regular hourly wage for work in excess of 40 hours in one week. The CWHSSA also provides for the payment of liquidated damages where violations occur and addresses safe and healthy working condition. The CWHSSA does not apply to contracts of \$100,000 or less.
4. The Fair Labor Standards Act of 1938, as amended (referred to as "the Act" or "FLSA"), is published in Chapter 9, sections 201 et seq. of U.S.C. Title 29. The Act provides for minimum standards for both wages and overtime (O/T) entitlement, and spells out administrative procedures by which covered work time must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups

of employees from the application of certain of its provisions. These standards are generally applicable to all labor performed and may be pre-empted by other (often more stringent) federal standards such as the DBRA prevailing wage requirements and CWHSSA overtime provisions. Authority to administer and enforce FLSA provisions resides solely with the DOL.

## **Federal Labor Standard Requirements**

Federal labor standards are required for every contract for the construction (rehabilitation or new) of housing that includes 12 or more units assisted with HOME funds. These contracts must contain a provision requiring the payment of prevailing wages pursuant to the DBRA, and are also subject to the overtime provisions of CWHSSA. These provisions apply if HOME funds are used for any project cost.

The definition of HOME-assisted units is key to the determination of whether a project is required to comply with federal labor standards. HUD statements on the subject (. see Labor Relations Letter “LR-96-02” and CPD Notice 98-02 in Appendix III) indicate that identification of HOME-assisted units in multi-unit projects hinges upon the proportion of HOME funds to other funding sources within the total HOME-eligible development costs. Identifying the number of HOME-assisted units is the responsibility of HCD, using information supplied by the State Recipient or CHDO. In multi-unit projects, that number is obtained either by one of two methods:

- 1) **Pro-Rating applies:** if unit sizes and amenities are comparable, the number of HOME-assisted units is obtained by calculating that portion of HOME-eligible development costs which are funded by HOME. For example, if 50% of the eligible development costs are paid with HOME funds, then 50% of the units would be HOME-assisted, provided the HOME share per unit does not exceed the maximum per-unit subsidy limit.
- 2) **Cost Allocation applies:** if unit size and amenities are not comparable throughout the project, particular units that will remain permanently HOME-assisted must be identified, and costs attributed to them. Of course, spending per unit must not exceed the maximum per-unit subsidy outlined at 24 CFR, Part 92.250.

The number of HOME-assisted units will be listed in Part B., Box #7 of the “Homeownership Assistance/Rental Housing Project Set-Up Report” (HUD form 40094) which will be filled out for each project. The figure in Box #7 will be accepted as the number of units potentially triggering the applicability of federal labor standards requirements. If the number of HOME-assisted units is 12 or greater, all federal labor standards apply. If the number of HOME-assisted units is 11 or fewer, then federal wage provisions do not apply, but other standards, such as CWHSSA, may apply.

If more than one project is included in a single construction contract (e.g. a number of single-family homes), the sum of the HOME-assisted units in the various projects will be used in determining if federal wage and labor standards apply.

The use of multiple construction contracts within a single project for the purposes of avoiding wage provisions is not permitted [24 CFR 92.354(a)(2)].

### **Exceptions**

A single-family home purchase is not generally covered by federal labor standard provisions unless the following is applicable:

- 12 or more homes are set up as a single project;
- A written agreement with a developer stipulates HOME funding precedent to construction and there are 12 or more homes involved;
- The State Recipient or CHDO owns 12 or more lots through the construction period and has the homes built under a single construction contract.

HOME contractors should always consult their HOME representative about ambiguous situations (e.g., site development of a single-family tract under one construction contract and subsequent sale and development of individual lots).

### **HOME Contractor Responsibilities if Federal Labor Provisions DO NOT Apply**

- Notify your HOME representative as soon as possible after receiving the funding commitment that the project is not bound by federal labor standards. Document how this conclusion was reached (calculation of the number of HOME-assisted units).
- Receive written confirmation from the HOME representative agreeing with this conclusion. Keep this confirmation in the project files.
- Notify your HOME representative as soon as possible if there is any change (additional funding sources or requirements, change in the number of HOME-assisted units, etc.) that might effect the application of federal labor provisions.
- Follow good practices in planning for and administering construction activities by determining contractor eligibility (by obtaining verification that all proposed contractors are licensed by the California Contractors License Board and certification that the contractors and subcontractors have not been debarred or suspended from participation in a transaction with any federal agency), negotiating contracts, holding a pre-construction conference, etc. A sample federal debarred or suspended certification is provided in Appendix III-M.
- Consult with your HOME representative to determine to what extent HCD will be involved in construction planning and disbursement issues.

- Remember that other Federal labor provisions may apply, even if the wage payment portions of the DBRA do not. These include, but are not limited to, the CWHSSA, the Anti-Kickback Act and the FLSA.

## **HOME Contractor Responsibilities if Federal Labor Provisions**

### **DO Apply**

- Notify your HOME representative as soon as possible after receiving the funding commitment that the project is bound by federal labor standards. Document how this conclusion was reached (calculation of the number of HOME-assisted units).
- Receive written confirmation from the HOME representative agreeing with this conclusion. Keep this confirmation in project files.
- If calculations indicate that DBRA wage provisions **do** apply, and you are a: 1) public agency, then immediately select a staff member to function as Labor Standards Coordinator for the project, or 2) a CHDO, then immediately retain professional assistance from the local government or hire an acceptable private consultant to function as Labor Standards Coordinator for the project.
- Throughout the planning, pre-construction, and construction phases, use and maintain an up-to-date “Construction Checklist”, located in Appendix III-A.

## **Pre-construction Activities Requirements**

- The Labor Standards Coordinator should contact their HOME representative to receive a full package of information regarding labor standards administration and enforcement. This will include copies of relevant laws, proper HUD and DOL forms, and helpful HUD publications.
- Request the Federal Wage Determination applicable to the geographic area where the project is located. This can be obtained from the HOME representative by submitting “Standard Form 308” (Appendix III-C). It is extremely important that wage determinations be requested for each individual project. Each request must be made to the Department in sufficient time (at least 45 calendar days prior to advertising for bids) to allow for processing. A full description of the work to be performed must be provided on the SF-308 form. This process should assure the issuance of the appropriate wage determination. However, should the determination not have an expiration date, the HOME contractor should contact his or her HOME Representative at least 15 calendar days prior to the bid opening. Your HOME Representative will then follow up with the HUD Labor Relations Office to assure that the wage determination has not been modified or superseded ten days prior to the bid opening.

- If the Classifications and rates needed are not listed on the wage determination issued then the Department should be contacted and advised of the classification(s) desired. It may be possible to conform a classification to another classification on the wage determination, provided it is a prevailing practice in the area. If the classification cannot be conformed, a completed HUD 4230-A (Additional Classification and Rate Request) must be submitted in order to set up the classification and rate for the needed craft(s) (see Appendix III-D).
- Include the Labor Standards Provisions (Appendix III-B) and the full Wage Determination form in the project bid package when it is distributed to potential bidders.
- Obtain an updated wage determination before going out to bid. Federal Regulations (29CFR Part 1(c)(3)(i)) state that the latest determination in effect at the time of bid opening (unless published less than 10 days previously) will be effective. The possibility of updates affecting project labor costs should be communicated clearly to potential bidders.
- Check the HUD web site to ensure that the successful bidder is not on the Federal list of debarred or suspended contractors and therefore deemed ineligible, at <http://epls.arnet.gov/>
- The federal government, through the issuance of Executive Order 12549 (dated February 10, 1986), requires all projects using federal funds (including HOME) to certify to the best of their knowledge that they or any other principal person working on the contract/grant have not been disbarred or suspended from participation in a transaction with any federal agency. This certification must be included in all bid requests and contracts entered into by the HOME contractor, contractor, and subcontractors on projects using HOME funds and provided to your HOME representative prior to project setup. A sample certification is provided in Appendix III-M.
- Send a Notice of Contract Award/Pre-construction Conference/Start of Construction (Appendix III-E) to your HOME representative within 10 working days of contract award. This Notice provides, along with other information, the name of the person responsible for labor standards compliance. If a contract is not awarded within 90 days of bid opening, a new Wage Determination will have to be obtained, which may affect project cost.
- Although HUD no longer requires a preconstruction conference for federal labor standard purposes, it is still considered best practices to do so. During a preconstruction conference not only are federal labor requirements discussed, but also construction inspections, progress and contractor payment requirements, Section 3 employment and training, along with other unique circumstances associated with the project. A Labor Standards Pre-construction Conference should be attended by the

Primary (General) Contractor, the foreman or construction superintendent, and the person on staff who will be preparing payrolls, as well as all identified Subcontractors. Sample minutes to be used in a preconstruction conference are provided in Appendix III-F.

### **Construction Requirements**

- Monitor weekly payroll reports supplied by contractor and subcontractor, per guidance provided by HUD and HCD.
- Conduct job site employee interviews, per HUD and HCD guidance. This is one of the most important aspects of monitoring contractor compliance with federal labor standards. Employee interviews must be sufficient to establish the degree of compliance and to indicate the nature and extent of violations, if any. They must also be representative of all classifications of employees on the project. Every effort should be made, within existing staffing levels, to interview up to 10 percent of the workers in all trades on long-term projects (more than six months). A representative sample of all trades on short-term projects should be interviewed.
  - Upon discovery of any inconsistencies or deliberate deception on the part of any contractor or subcontractor, take immediate steps to work with that contractor to clear up the problem. Should the contractor fail to comply with requests to remedy the situation, contact your HOME representative for advice and assistance. More detailed information regarding compliance procedures is contained in the package of information provided by the Department to those State Recipients and CHDOs undertaking projects with 12 or more HOME-assisted units.
  - File semi-annual Federal Labor Standards Enforcement Reports with your HOME representative (Appendix III-G) by April 5 (October 1 through March 31 reporting period) and October 5 (April 1 through September 30 reporting period) each year. These reports are needed in order to document compliance with and enforcement of the labor standards provisions of the DBRA and its related acts. The Department compiles the submitted information and then furnishes it to HUD.
- Within 30 days (or 60 days if an investigation of underpayment is taking place) of completion of the project, file a Final Wage Compliance Report (Appendix III-H).

### **Exceptions**

The wage rate determinations and federal labor standards provisions do not apply in all instances. The following activities and types of workers are exempt:

- Delivery of machinery, goods, and/or services is exempt, as long as installation, rehabilitation or new construction is involved. Construction contracts for less than \$2,000 are exempt;
- Volunteer workers. Persons may be considered volunteers only when their services are offered freely and without pressure or coercion, directly or implied, from an employer. Volunteers may receive benefits or a nominal fee to perform the services for which they volunteered, but in no case shall such benefits be construed in any way as paid compensation;
- “Sweat equity” contributions (i.e., members of an eligible family who provide labor in exchange for acquisition of a property for homeownership or provide labor in lieu of, or as a supplement to, rent payments);
- Other exceptions to DBRA wage requirements are: 1) apprentices who may work at less than the prevailing wage rate if they are registered in a bona fide apprenticeship program approved by the State and are employed within the acceptable ratio to journeypersons; 2) trainees who are employed under a program which has been approved by DOL.

**Note:** So-called “helper” classifications were formally suspended by DOL on October 21, 1993. Wage Determinations no longer identify these positions and workers may not be paid as helpers. Only journeymen, laborers, and approved apprentices can do construction work on federally funded projects.

### **Recordkeeping Requirements**

HOME contractors should keep scrupulous records of all activities and actions related to federal labor standards compliance. Records should be maintained in one place. A detailed list of required records will be found in the package of information provided by the Department to those State Recipients and CHDOs undertaking projects with 12 or more HOME-assisted units. Federal labor standards records must be retained for a period of five years after completion of a project.

### **State of California Labor Provisions**

Prior to Senate Bill 975 (SB 975), that became effective January 1, 2002 (Chapter 938), HOME-funded projects were exempt from State of California Labor Code provisions, including the payment of State Prevailing Wages (Sec. 1771) and overtime (Section 1815), unless the projects were developed, owned, or managed by local government or other local public agencies. These provisions were only invoked by public works projects (“construction, demolition or repair work done under contract and paid for in whole or in part out of public funds”). Since the passage of SB 975, HOME-funded construction projects may be subject to State of California Labor Code provisions, including the payment of State Prevailing Wages (Sec. 1771) and overtime (Section 1815).



The responsibility for determining the applicability of SB 975 is given to the “awarding body.” Under applicable state laws (Labor Code Section 1772), HOME is not the “awarding body” for construction-related activities. The “awarding bodies” in the HOME program may be, 1) the State Recipient, 2) the CHDO, 3) the sub-recipient, or 4) home owner (if contracting for home repairs). Because HOME is not the state administrative agency charged with interpreting and implementing the provisions of SB 975, HOME is not in a position to advise you definitively regarding any compliance requirements.

The Department of Industrial Relations (DIR) issued an advisory on November 5, 2001 stating that the terms of SB 975 “will be strictly enforced for all public works projects advertised for bids on or after January 1, 2002.” Most construction-related assistance provided by HOME is covered under this definition of public works. The DIR is the department responsible for interpreting SB 975. They may be reached by phone at: (415) 703-5050 or by email at: [info@dir.ca.gov](mailto:info@dir.ca.gov). DOL also maintains a website at [www.dir.ca.gov](http://www.dir.ca.gov) that provides information about SB 975.

State Recipients and CHDOs should check to ascertain whether other project funds require adherence to State Prevailing Wage and overtime provisions. For example, a project funded with HOME and the State Multifamily Housing Program (MHP) is subject to the State prevailing wages even if it is not subject to DBRA. In this case, projects have to meet the strictest requirements (e.g. highest wages) of the applicable provisions. It is strongly recommended that HOME contractors request and receive written confirmation from local government regarding applicability of State labor law before the project is put out to bid. A copy of this confirmation, whether positive or negative, should be supplied to the HOME representative for inclusion in project files.

If both State labor law and federal labor standards are applicable, the higher wage determinations and regulatory restrictions apply. Any project in this category should closely coordinate with their HOME representative. It should be remembered, however, that the HOME Program will not monitor or audit compliance with the State Labor Code. Such compliance will be a matter between the HOME contractor and appropriate State officials.

## **Additional Resources**

### **HUD Labor Standard Links**

Making Davis Bacon Work: A Practical Guide for States, Indian Tribes and Local Agencies (June 2001) [www.hud.gov/offices/olr/stindla.pdf](http://www.hud.gov/offices/olr/stindla.pdf)

Making Davis Bacon Work: A Contractor's Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects (June 2001) [www.hud.gov/offices/olr/wagereq.pdf](http://www.hud.gov/offices/olr/wagereq.pdf)

Labor Standards Administration and Enforcement Guidelines for HUD Program Participants Provides answers to commonly asked questions for streamlining labor standard procedures. (May 1996, Desk Guide LR-II) [www.hud.gov/offices/olr/olrguid2.cfm](http://www.hud.gov/offices/olr/olrguid2.cfm)

HOME Crosscutting Federal Regulations: Labor Standards and Contracting [www.hud.gov/offices/cpd/affordablehousing/lawsandregs/fedreq/l/labor.cfm](http://www.hud.gov/offices/cpd/affordablehousing/lawsandregs/fedreq/l/labor.cfm)

Application of Federal labor standards to HOME projects (August 21, 1996, Letter No. LR-96-02) [www.hud.gov/olr/olr\\_9602.html](http://www.hud.gov/olr/olr_9602.html)

OLR Library  
[www.hud.gov/olr/library.cfm](http://www.hud.gov/olr/library.cfm)

### **DOL Labor Standard Links**

U.S. Department of Labor  
[www.dol.gov](http://www.dol.gov)

Davis-Bacon Act Index, prepared by Division of Fair Labor Standards  
(February 1990 revised) [www.oalj.dol.gov/public/DBA/REFRNC/dbindexa.htm](http://www.oalj.dol.gov/public/DBA/REFRNC/dbindexa.htm)

Davis Bacon (DOL): Search Wage Determinations  
[www.access.gpo.gov/davisbacon/davbacsearch.html](http://www.access.gpo.gov/davisbacon/davbacsearch.html)  
Or  
[www.dol.gov/dol/esa/public/programs/dbra/WD10Instrctns/wd10instructions.htm](http://www.dol.gov/dol/esa/public/programs/dbra/WD10Instrctns/wd10instructions.htm)

List of Parties Excluded From Federal Procurement and Nonprocurement Programs (GSA)  
<http://epls.arnet.gov/>

Davis Bacon and Related Acts: Frequently Asked Questions  
[www.dol.gov/dol/esa/public/programs/dbra/faqs.html](http://www.dol.gov/dol/esa/public/programs/dbra/faqs.html)

California Department of Industrial Relations  
[www.dir.ca.gov/](http://www.dir.ca.gov/)

California Department of Industrial Relations Division of Labor Statistics and Research (**DLSR**)  
Prevailing Wage Determinations  
[www.dir.ca.gov/dlsr/statistics\\_research.html](http://www.dir.ca.gov/dlsr/statistics_research.html)

California State Contractors License Board  
[www.cslb.ca.gov/](http://www.cslb.ca.gov/)